

Paper No.11

HRW

THIS DISPOSTION IS NOT
CITABLE AS PRECEDENT OF THE TTAB AUG. 27, 99
U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Dennis Bearden

Serial No. 75/108,390

John S. Egbert of Harrison & Egbert for Dennis Bearden.

Mitchell Front, Trademark Examining Attorney, Law Office
101 (Christopher Wells, Acting Managing Attorney).

Before Cissel, Hohein and Wendel, Administrative Trademark
Judges.

Opinion by Wendel, Administrative Trademark Judge:

Dennis Bearden has filed an application to register
the mark CENTURY A/C SUPPLY and design, as shown below, for
"wholesale distributorships featuring air conditioning
supplies for contractors and for multi-family housing."¹

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¹ Serial No. 75/108,390, filed May 23, 1996, claiming first use dates of 1974. A disclaimer of the phrase "A/C SUPPLY" has been entered.

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 USC § 1052(d), on the ground of likelihood of confusion with the registered mark CENTURY for "electronic air cleaners," in Class 9, and "air conditioners, gas, oil and electric furnaces, heat pumps, blowers, coils, coil cabinets, electric duct heaters, humidifiers, air handlers and condensing units," in Class 11.²

Applicant and the Examining Attorney have filed briefs, but no oral hearing was requested.

As a preliminary matter, we note that the Board, on September 16, 1998, denied applicant's request, filed as part of a reply brief, to suspend this appeal and remand the application to the Examining Attorney for consideration of additional evidence which was first submitted in connection with applicant's appeal brief. The Examining Attorney had objected in his brief to this evidence as being untimely under Trademark Rule 2.142(d), 37 CFR 2.142(d), and requested that no consideration be given thereto. The Board, in denying applicant's request for a remand, pointed out that applicant had failed to show that

² Reg. No. 1,089,611, issued April 18, 1978, claiming a first use date and first use in commerce date of August 1, 1969 for the Class 9 goods and a first use date and first use in commerce date of October 7, 1926 for the Class 11 goods. Combined Section 8 & 15 affidavit accepted; first renewal in 1998.

this evidence was not earlier available, the usual prerequisite for granting such a request. Accordingly, in deciding this appeal, we have given no consideration to Exhibits A-H attached to applicant's brief or to applicant's arguments with respect thereto.

Turning to the issue of likelihood of confusion, we consider first the similarity or dissimilarity of the marks involved. The Examining Attorney takes the position that inasmuch as the A/C SUPPLY portion of applicant's mark CENTURY A/C SUPPLY is descriptive wording which has been disclaimed, and the design element is not sufficient to alter the overall commercial impression, the dominant feature of applicant's mark is CENTURY, which is identical to the registered mark CENTURY. The Examining Attorney points out that applicant, in one of the catalogs which serve as specimens in the application, often refers to his company simply as CENTURY and argues that customers would be likely to call for applicant's services in the same way. Applicant, on the other hand, argues that the additional wording A/C SUPPLY cannot be ignored; that this phrase is suggestive of the services performed under the mark and thus creates a different commercial impression for the mark as a whole from the registered mark.

Although it is true that in determining the likelihood of confusion, marks must be considered in their entireties, it is well established that there is nothing improper in giving more or less weight to a particular feature of a mark. In re National Data Corp., 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). Although descriptive portions of a mark cannot be ignored, the fact remains that the purchasing public is more likely to rely on the non-descriptive portion as the indication of source. This is particularly true when the descriptive portion has been graphically relegated to subordinate status in the mark, as is the case here. See Hilson Research Inc. v. Society for Human Resource Management, 27 USPQ2d 1423 (TTAB 1993).

We find the word CENTURY to be the dominant feature of applicant's mark. The fact that applicant has included a descriptive reference to the type of services rendered in the mark is not likely to have a significant effect on purchasers; it is the word CENTURY which creates the commercial impression for the mark as a whole. Applicant's own use of the shortened form CENTURY is indicative that purchasers will do the same. The design element is also of little import, because it is the word portion of a mark, rather any design feature, unless highly distinctive, which is more likely to be remembered and relied upon by

purchasers in calling for the services. See *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987).

Moving on to the distributorship services in connection with which applicant uses his mark and the goods covered by the registration, we note that it is sufficient for finding a likelihood of confusion if the goods and services with which the respective marks are being used are related in some manner such that they would be seen by the same individuals under circumstances which would cause them to believe that the goods and services emanate from the same source. See *In re Peebles, Inc.*, 23 USPQ2d 1795 (TTAB 1992); and *General Mills Fun Group, Inc. v. Tuxedo Monopoly Inc.*, 204 USPQ 396 (TTAB 1979), *aff'd*, 648 F.2d 1335, 209 USPQ 986 (CCPA 1981).

The degree of similarity of the goods and services need not be as great when the marks are essentially the same, as contrasted to situations in which there are arguable differences between the marks. *In re Peebles, Inc.*, *supra* at 1796.

The Board has found in the past that there is no question but that there is a relationship between store services and the goods which may be sold in that store. See *In re Best Products Co.*, 231 USPQ 988 (TTAB 1988). We are of the opinion that a similar relationship exists

between distributorship services and the products carried by that distributorship. As pointed out by the Examining Attorney, applicant, as a distributor of air conditioning supplies, would be expected to handle goods covered by the registration, such as air conditioners, blowers, coils, air handlers, condensing units and electronic air cleaners.

The catalogs submitted as specimens show that products of this nature are in fact being offered by applicant. While applicant argues that the products actually sold by his distributorship are air conditioning "components" for the maintenance of existing air conditioning systems, the specimens clearly demonstrate an overlap with the products listed in the registration. Furthermore, not only does the phrase "air conditioning supplies" as used in applicant's recitation of services cover original equipment as well as replacement parts, but also the goods recited in the registration include components as well as complete units.

In addition, the Examining Attorney has made of record four third-party registrations showing that these entities have registered their marks for both distributorship services for air conditioning units, replacement parts therefor or other home equipment and for the equipment itself. This evidence, in conjunction with the depiction in the specimens of record of products carried by

applicant, demonstrates that purchasers have a basis to expect that a manufacturer of air conditioning equipment also provides distributorship services for its equipment or that a distributor might be offering equipment under its own brand name, particularly when virtually identical marks are being used for both the services and the goods. See *In re Mucky Duck Mustard Co., Inc.*, 6 USPQ 1467 (TTAB 1988).

Applicant further argues that the channels of trade are dissimilar, in that applicant's services are directed to managers and maintenance personnel of multifamily dwellings and not to the individual home owners who would purchase registrant's air conditioners. We find no basis for this distinction, however, in the goods as identified in the registration. There are no restrictions as to channels of trade for registrant's goods, and thus they must be presumed to travel in all the normal channels of trade. See *Kangol Ltd. v. KangaROOS U.S.A. Inc.*, 974 F.2d 161, 23 USPQ2d 1945 (Fed. Cir. 1992) and the cases cited therein. The same contractors and managers or maintenance personnel who would avail themselves of applicant's distributorship services fall within the group of potential purchasers of the air conditioners, electronic air cleaners or other equipment sold by registrant.

The remainder of applicant's arguments are directed to the purportedly minimal use by registrant of its mark and the alleged weakness of CENTURY as a mark, in view of the many existing registrations and applications for this mark. Because of the exclusion of the evidence offered by applicant in support of these arguments, we have no reason to entertain them. Suffice it to say, the cited registration must be given the full statutory presumptions accorded it under Section 7(b), and cannot be challenged in this ex parte proceeding. See *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997). Moreover, even if the registered mark were a so-called "weak" mark, it would be entitled to protection against the registration of a nearly identical mark for services which might reasonably be assumed to emanate from the same source. See *OPTOmechanisms, Inc. v. Optoelectronics, Inc.*, 175 USPQ 246 (TTAB 1972).

In summary, in view of the high degree of similarity of applicant's mark CENTURY A/C SUPPLY and design and the registered mark CENTURY, and the close relationship between the services and goods, respectively, with which the marks are being used, we find confusion of the part of potential purchasers to be likely.

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Decision: The refusal to register under Section 2(d)
is affirmed.

R. F. Cissel

G. D. Hohein

H. R. Wendel
Trademark Administrative Judges,
Trademark Trial and Appeal Board